SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 1050

JOSEPH A. KOVAC,

Petitioner,

vs.

LUCILE R. KOVAC,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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In the
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OCTOBER TERM, 1961

No.

JOSEPH A. KOVAC,

Petitioner,

vs.

LUCILE R. KOVAC,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

To the Honorable Justices of the Supreme Court of the United States:

Petitioner Joseph A. Kovac, Defendant-Appellant in the proceedings below, petitions this Court for a Writ of Certiorari to the Supreme Court of Illinois, to review the final judgment of the Supreme Court of Illinois, entered March 21, 1962, denying Petitioner's Petition for Leave to

Appeal from the Judgment of the Appellate Court of Illinois, Second District. Entered November 15, 1961 (Rec. 8).

The Respondent, Plaintiff below, filed suit in the Circuit Court of McHenry County, Illinois for divorce or in the alternative for separate maintenance. An Order for temporary alimony was entered on June 25, 1957, providing for the payment of $200.00 per week for alimony and support of the two minor children. A Petition for a Rule To Show Cause was entered against Petitioner on August 2, 1957, as to why he should not be held in contempt of court for failure to comply with said Order for temporary alimony. A hearing was had on said Rule on September 6, 1957, at which time the following Order was entered:

> "On motion of William I. Caldwell, Attorney for Plaintiff, the Court having heard the testimony of witness, and being fully advised,
>
> It Is Ordered That the Defendant be and he is hereby adjudged in Contempt of this Court and said Defendant is sentenced to the County Jail of McHenry County for 60 days". (Rec. p. 4; Abs. p. 5)

Petitioner took an appeal from the Order holding him in contempt to the Appellate Court, Second District, which Court affirmed the contempt Order on April 3, 1958, *Kovac* v. *Kovac*, 17 Ill. App. 2d 492, 150 N.E. 2d 664 in a Memorandum decision.

Thereafter, on December 17, 1958, Defendant paid the amount due under the Rule To Show Cause, and in spite of which payment, an Order of Commitment was entered

committing the Defendant to the County Jail of McHenry County for 60 days for failure to comply with said alimony Order. (Rec. p. 4; Abs. pp. 8-9)

On December 22, 1958, Defendant filed a Petition to be purged of contempt, and to vacate said Order of commitment by reason of payment of said alimony. (Rec. p. 4; Abs. pp. 14-18)

On February 8, 1961, an Order was entered by the Trial Court denying Defendant's Petition to be purged of contempt on the ground that said contempt was "direct contempt" of court, and that Defendant could not purge himself of said contempt by having paid the alimony due. (Rec. p. 4; Abs. pp. 22-23)

Petitioner presented a timely appeal to the Appellate Court, Second District, of the State of Illinois, and said Appellate Court dismissed said appeal on the ground that its first decision was "res judicata" as to Petitioner's Petition to be Purged of Contempt, which memorandum decision is reported in 32 Ill. App. 2d 349; 177 NE 2d 878.

A timely Petition for Rehearing was filed in said Appellate Court, and was denied by Order entered December 1, 1961. (Rec. p. 4; Abs. p. 59)

On January 5, 1962, a timely Petition was filed in the Office of the Clerk of the Supreme Court of Illinois for Leave To Appeal from said decision of said Appellate Court, rendered November 15, 1961. This Petition for Leave To Appeal was denied by Order of the Supreme Court of Illinois entered March 21, 1962 (Rec. p. 2), thereby making said decision of the Appellate Court of Illinois, Second District, rendered November 15, 1961, final.

Opinion below.

The Opinion of the Appellate Court of Illinois, Second District, rendered April 3, 1958, is reported in 17 Ill. App. 2d 492; 150, N.E. 2d 664 in a memorandum decision, being presented herein in full in the appendix hereto, pages 1-9a, and the Opinion of the Appellate Court of Illinois, Second District, rendered November 15, 1961, is set forth in full in the appendix hereto, pages 10-14a and is reported in 26 Ill. App. 2d 29, 167 N.E. 2d 281.

The Petition for Leave to Appeal was denied without opinion. (Rec. p. 8).

Statement of grounds on which this Court's jurisdiction is invoked.

Subdivision (3) of Section 1257 of Title 28, Judiciary and Judicial Procedure, is relied upon as giving jurisdiction to the Supreme Court of the United States to review the final judgment of the Supreme Court of Illinois in this cause. It reads as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929." (U.S.C.A., Title 28, Sec. 1257 (3)).

The question as to due process of law arose for the first time in the Appellate Court of Illinois, and Petitioner duly

raised the question before the Supreme Court of Illinois in his Petition For Leave To Appeal to that Court, and in which he stated:

> "THE FINDING OF THE APPELLATE COURT THAT THE CONTEMPT ORDER ENTERED SEPTEMBER 6, 1957 WAS 'PUNITIVE' OR 'DIRECT CRIMINAL CONTEMPT DEPRIVES THE DEFENDANT OF DUE PROCESS OF LAW AS GUARANTEED BY THE CONSTITUTION OF THE STATE OF ILLINOIS AND THE CONSTITUTION OF THE UNITED STATES.

Section 2 of Article 2 of the Constitution of the State of Illinois and Amendments 5 and 14 of the Constitution of the United States pertain to the right to due process of law and are set forth in the Appendix.

It is respectfully submitted that what has taken place in this case does not constitute due process of law. The Defendant was ordered to pay alimony and support. Instead of paying alimony and support he paid bills for the Plaintiff and the minor children at the request of plaintiff and her attorneys which were far in excess of the alimony and support due. The Trial Court refused to allow him credit for these payments, holding him in contempt of court, and sentencing him to 60 days in jail and nothing else. On appeal, the Appellate Court likewise refused to allow these credits, and affirmed the contempt Order. After the case was remanded to the lower court, the Defendant paid the $1,000.00 alimony and support due. The same day payment was authorized, the lower court, through another Trial Judge, entered an Order committing him to 60 days in jail, well knowing that the alimony and support had been paid. The Order of Commitment contained no provision as to the amount due or whereby Defendant could purge himself. The Defendant then filed a Petition to either vacate this Order of Commitment or to be purged of contempt by reason of his payment of the money due. This was denied and an Appeal taken. * * *

The Appellate Court dismissed Defendant's appeal on the ground that its Order holding him in contempt of Court was res judicata, as to Defendant's Petition to be purged.

If this constitutes due process of law in this great land of ours, it is respectfully submitted that due process has ceased to exist in these United States.

As to whether or not a contempt proceeding raises a question of due process, this Court has so held in many cases. The latest case on the subject decided by this Court is the case of *People* v. *Loughran*, 2 Ill. 2d 258; 118 N.E. 2d 310 at 313, in which the Court said:

'The power to adjudge guilt and impose punishment without proof of examination, and without plea, trial or issue exists in no other situation or proceeding. It is an exception to our constitutional guarantees which we would regard as intolerable in any other proceeding or for any other purpose. It is readily susceptible of abuse and fraught with danger not only to personal liberties but to the respect and confidence which our courts must maintain. Although such power is universally recognized as essential to an orderly and effective administration and execution of justice, it should be exercised with utmost caution and strictly restricted to acts and facts seen and known by the court, and no matter resting upon opinions, conclusions, presumptions or inferences should be considered.'

It is respectfully submitted that to sentence a man to jail for failure to pay alimony and support after he has done so, should be regarded by this Court as 'intolerable' and constitutes 'abuse and fraught with danger' to the personal liberty of the Defendant herein, and is a gross invasion of the constitutional guarantee of due process of law, and should not be countenanced by this Court." (Rec. p. 2; Pet. pp. 40-44)

While the Supreme Court of Illinois did not pass on this question in denying the Petition For Leave To Appeal, it is respectfully submitted that the decision of the Appellate Court of Illinois constitutes a "surprise" decision, wherein the constitutional issue involved herein was born, and that the constitutional question involved herein can be raised in no other way than through this Petition For Writ Of Certiorari.

Saunders v. *Shaw*, 244 U.S. 317, at 320.

The question of due process of law, as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States is involved in this proceeding.

THE QUESTIONS PRESENTED FOR REVIEW.

1. Whether a party to a divorce proceeding can be held in direct contempt of court for failure to pay alimony and support pursuant to an Order entered in said proceeding, and if so held in direct contempt, does such action constitute denial of due process of law.

2. Whether a person who has been held in contempt of court for failure to pay alimony due under a temporary Order entered in a divorce proceeding, subsequently pays such alimony due, as to whether or not an Order of Commitment, committing him to jail for contempt of court for failure to pay such alimony, constitutes denial of due process of law in violation of the Fifth Amendment and the Fourteenth Amendment to the Constitution of the United States.

3. Whether a party to a divorce proceeding held in contempt of court for failure to pay alimony, and he sub-

sequently pays alimony due, is denied equal protection of the laws, when it has been held that payment of such alimony purges one of contempt.

4. The Appellate Court and Supreme Court of Illinois deprived the Petitioner of due process of law in holding that an Order holding Petitioner in contempt of court for failure to pay alimony valid, is "res judicata" as to a Petition to be Purged of Contempt based upon the ground that the alimony due had been paid.

5. The Supreme Court of Illinois deprived the Petitioner due process of law in denying a Petition for Leave to Appeal from a judgment of the Appellate Court of Illinois holding that a decision finding an Order holding Petitioner in contempt of court for failure to pay alimony is "res judicata" as to a Petition to be Purged of Contempt based upon the ground that the alimony due has been paid.

6. Whether a person charged with civil contempt can be convicted of criminal contempt.

CONSTITUTION, STATUTES AND ORDINANCES INVOLVED.

The determination of the questions involved depends upon the application of the Fifth and Fourteenth Amendments to the Constitution of the United States, as applied to the facts and Orders entered in this proceeding.

STATEMENT OF THE CASE.

A suit for Divorce or in the alternative for Separate Maintenance was filed in the Circuit Court of McHenry County, Illinois, on February 13, 1957.

A hearing was had on June 25, 1957 on Plaintiff's Petition for Temporary Alimony and Attorney's Fees and an order entered on said date providing that defendant pay plaintiff as and for temporary support of plaintiff and the two minor children the sum of $200 per week. (Rec. p. 4; Abs. p. 1)

A Petition for a Rule to Show Cause was filed on August 2, 1957 setting forth that said Order was entered on June 25, 1958 ordering Defendant to pay Plaintiff the sum of $200 per week for temporary support of the Plaintiff and her two minor children and that said Defendant had paid nothing under the order. (Rec. p. 4; Abs. pp. 2-3)

On August 22, 1957 Defendant filed an Answer to said Petition for a Rule to Show Cause denying that Plaintiff had received nothing under said order but that Plaintiff had received indirectly the sum of to-wit $5,000.00 as and for household expenses, clothing for the two minor children and tuition, board and lodging paid to Fairfax Hall, Waynesboro, Virginia and other incidental expenses pertaining to the support and maintenance of the Plaintiff and the said minor children. (Rec. p. 4; Abs. p. 4)

A hearing was held on said rule on September 6, 1957 and the following order was entered:

> "On motion of William I. Caldwell, Attorney for Plaintiff, the Court having heard the testimony of witness, and being fully advised,

It Is Ordered that the defendant be and he is hereby adjudged in Contempt of this Court and said defendant is sentenced to the County jail of McHenry County for 60 days.

William M. Carroll, Judge."

(Rec. p. 4; Abs. p. 5)

On September 6, 1957 Defendant filed his Notice of Appeal from this last mentioned order (Rec. 22) and filed his cash Appeal Bond in the sum of $5,000. (Rec. p. 4; Abs. p. 6)

On November 22, 1957 Defendant filed his Petition for a Change of Venue and on the same date Judge Carroll entered an order denying the Petition but reassigned the case to Judge Bernard Decker. (Rec. p. 4; Abs. p. 6)

The order entered on September 6, 1957 was affirmed by the Appellate Court on April 3, 1958, Case No. 11157, *Kovac* v. *Kovac*, 17 Ill. App. 2d 492, 150 N.E. 2d 664.

A Petition to Commit the Defendant for Contempt was filed by Plaintiff on December 17, 1958 (Rec. p. 4; Abs. pp. 6-8) setting forth the entry of the order holding defendant in contempt, the appeal taken, the affirmation of the order by the Appellate Court, that defendant had paid nothing on the support order during said appeal and praying that a mittimus issue committing the defendant to jail for 60 days or until released by due process of law.

An order was entered pursuant to said Petition (Rec. p. 4; Abs. pp. 8-9) in words and figures as follows:

ORDER TO COMMIT DEFENDANT FOR CONTEMPT.

This matter coming on to be heard upon the petition of the Plaintiff, Lucile R. Kovac, for an order committing the defendant, Joseph A. Kovac, for contempt, and the Court having jurisdiction of the parties and

of the subject matter and being now fully advised in the premises, Finds:

1. That on June 25th, 1957 an order was entered herein requiring the defendant, Joseph A. Kovac, to pay to the Plaintiff as temporary support for the Plaintiff and the minor children of the parties the sum of $200.00 per week until the further order of Court, and that said order of support has never been reversed, modified or vacated and is now in full force and effect.

3. That on September 6, 1957, after hearing on a rule to show cause served upon the defendant, this Court ordered the Defendant to be committed to the County Jail of McHenry County, Illinois for a period of 60 days for his contempt of Court arising out of his failure to comply with said support order.

4. That the Defendant appealed from said contempt order by appeal to the Appellate Court of Illinois, Second District, after posting a cash bond in the sum of $5,000 and the mittimus was thereupon stayed.

5. That on April 3, 1958, the order finding the Defendant in contempt for failure to comply with said support order was affirmed and on June 11, 1958, the Defendant's petition for rehearing was denied.

6. That the Defendant thereupon petitioned the Supreme Court of Illinois for leave to appeal, but said petition was denied at the September term of the Supreme Court.

7. That following said denial the mandate was filed in this Court and no reason exists why the order of commitment for contempt should not be carried out.

It is Therefore Ordered that a mittimus issue from the office of the Clerk of this Court directed to the Sheriff of McHenry County to take the body of the

Defendant, Joseph A. Kovac, on Dec. 22, 1958 or as soon thereafter as he may secure the body of the said defendant and him closely and safely keep in the custody of said Sheriff in the common jail of McHenry County until he shall have served 60 days, or until released by due process of law.

Enter:

(Signed) Bernard M. Decker
Judge

On the same day, prior to the entry of the aforesaid Order to Commit Defendant, the Defendant presented his Petition to Modify the Order for Temporary Alimony entered on June 25, 1957 setting the amount at $200 per week. In this Petition Defendant set forth that a Rule to Show Cause was entered on August 2, 1957, for failure to comply with said support order, that defendant was held in contempt of court and sentenced to 60 days in Jail on September 6, 1957, that he appealed from the order and it was affirmed; that at the time of the entry of the Rule on August 2, 1957 there had accrued 5 weeks of support amounting to $1,000 and tendered said sum in open court to plaintiff. It further set forth that defendant had paid for schooling for the two minor children and that the oldest girl had married on January 1, 1958 and that circumstances had changed since the entry of the original order and prayed that the order be modified, that the defendant be purged of contempt by reason of payment of the amount due under the rule for contempt entered August 2, 1957. (Rec. p. 4; Abs. pp. 10-13)

The Court modified the order by reducing the support amount to $90 per week and provided that defendant pay all costs of tuition, room and board of said minor child at Fairfax Hall School, Waynesboro, Va. which she was attending. (Rec. p. 4; Abs. pp. 13-14)

On December 22, 1958 defendant filed a Petition to be Purged of Contempt before the Honorable William M. Carroll, pursuant to verbal direction of Judge Decker, in words and figures as follows (Rec. p. 4; Abs. pp. 14-18)

PETITION

To The Honorable William M. Carroll,
Judge Of Said Court

Your petitioner, Joseph A. Kovac, respectfully represents unto the Court.

1. That he is the defendant in the above-entitled cause and that an Order was entered herein on the 6th day of September, 1957, sentencing him to sixty days in jail for contempt of Court and that said Order for contempt arose as the result of his failure to comply with the terms of an Order entered herein on June 25, 1957, requiring your petitioner to pay the plaintiff in said cause as and for temporary alimony and support for the minor children of the parties hereto the sum of $200.00 per week.

2. Your petitioner further represents that an appeal was taken to the Appellate Court of Illinois, Second District, after posting a cash bond in the sum of $5,000.00 and that the issuance of a mittimus was stayed.

3. That on April 3, 1958, the Order finding the defendant in contempt for failure to comply with said support Order was affirmed and on June 11, 1958, the defendant's Petition for rehearing was denied.

4. That the defendant thereupon petitioned the Supreme Court of Illinois for leave to appeal, but said Petition was denied at the September Term of the Supreme Court.

5. That said appeal was taken to said Appellate Court by your petitioner on the advice of counsel that the Order entered herein on June 25, 1957 was void for want of jurisdiction of this Court over the subject matter of said cause to enter said Order, as well as the fact that this Court did not allow to your petitioner, credit for certain payments made in behalf of said plaintiff and said minor children of the parties hereto; that your petitioner was represented prior to the filing of a Rule To Show Cause herein on August 2, 1957, by Varian B. Adams, and that on said last mentioned date, Walter C. Wellman undertook the defense of said suit in behalf of your petitioner; that your petitioner was under the impression that either of said attorneys had in their possession a certain letter written by William I. Caldwell, attorney for plaintiff, dated on the 12th day of July, 1958, enclosing a copy of the bill for tuition and room and board for said minor children at Fairfax Hall School, a copy of which said letter and bill is hereto attached and that your petioner expended said amounts in accordance with said request; that neither of said attorneys had said letter at the time of the hearing herein and said letter was not introduced into evidence and this Court was not *informed of the contents thereof and the request of* plaintiff through her attorney that he paid said bill.

6. Your petitioner further represents that as of December 17, 1958, there accrued under the terms of the Order for alimony entered herein on June 25, 1957, the total sum of $15,400.00, including the sum of $1,000.00 which had accrued under said Order as of August 2, 1957, the date of the filing by plaintiff of her petition for a Rule To Show Cause; that at a hearing before the Honorable Bernard M. Decker, credits were allowed by Judge Decker on said amounts

in the sum of $7,475.00 for tuition, room and board, medical expenses, transportation expenses and clothing paid by your petitioner in behalf of the minor child Arnette Kovac and by reason of the fact that Elyse Kovac had married on December 31, 1957 leaving a balance due of $7,925.00.

7. Your petitioner further represents that in open Court he tendered of said cash bond deposit the sum of $1,000.00 to plaintiff and that plaintiff, through her attorney, William J. Gleason, refused said tender and that this defendant thereby purged himself of said contempt for which he was sentenced to sixty days in jail as aforesaid but that the Honorable Bernard M. Decker ordered that this question be assigned to the Honorable William M. Carroll to whom this Petition is directed.

8. Your petitioner further represents that he further offered to pay and an Order was entered by the Honorable Bernard M. Decker providing that the sum of $5,000.00 deposited as a bond as aforesaid be paid to the plaintiff to apply upon said arrearage of $7,925.00 and your petitioner offered to pay said balance of $2,925.00 within 120 days and that plaintiff's Petition for a new Rule To Show Cause was continued to March 23, 1959, at 1:30 P.M.

9. Your petitioner further represents that an Order was entered by the Honorable Bernard M. Decker on December 17, 1958, modifying said Order for alimony entered on June 25, 1957, by reducing the amount to be paid by your petitioner to said plaintiff from the sum of $200.00 per week to the sum of $90.00 per week and that your petitioner will comply with said Order to the best of his ability.

10. Wherefore your petitioner represents unto the Court, that he has purged himself of any and all contempt proceedings heretofore pending against him and that he is in good standing with this Court.

WHEREFORE, your petitioner prays that an Order be entered herein vacating the Order committing your petitioner for contempt entered herein on December 17, 1958, and Ordering the issuance of a mittimus committing your petitioner to the common jail of McHenry County, Illinois, for a period of sixty days and that this Court find that your petitioner has purged himself of contempt and that the Order entered herein on Sepember 6, 1957, be vacated and set aside and that your petitioner be discharged from said contempt Order.

Said Petition is signed by and supported by the Affidavit of said defendant as to the truth thereof.

Judge Carroll entered an Order granting leave to Defendant to file his petition and continued it generally (Rec. p. 4; Abs. pp. 18-19)

Plaintiff failed to plead to or answer this Petition.

A Decree of Divorce was entered on February 27, 1959 (Rec. p. 4; Abs. pp. 19-22), divorcing the parties and among other things, contained the following provisions:

> "That until the Court shall order otherwise, the Defendant shall comply with the order for temporary alimony and support entered in this cause on December 17, 1958."

An appeal was taken from the Decree of Divorce and was affirmed by the Appellate Court in *Kovac* v. *Kovac*, 26 Ill. App. 2d 29; 167 N.E. 2d 281.

On January 4, 1961 a Joint Order was entered by the Honorable Bernard M. Decker and the Honorable William M. Carroll assigning the Petition of the defendant, filed on December 22, 1958, to Vacate the Order of Commitment, entered December 17, 1958, and to be Purged of Contempt unto the Honorable Albert S. O'Sullivan (Rec. p. 4; Abs. p. 22)

An Order was entered by the Honorable Albert S. O'Sullivan on February 8, 1961 denying the Petition of the defendant to be Purged of Contempt and Other Relief (Abs. 22). It is from this Order and the Order entered by the Honorable Bernard M. Decker committing the defendant for contempt of Court that an Appeal was taken to the Appellate Court of Illinois (Rec. p. 4; Abs. pp. 23; 24)

At the proceedings held on December 17, 1958 before the Honorable Bernard M. Decker, Mr. Gleason stated that the primary object of the plaintiff was to commit the defendant for contempt and stated that Judge Carroll had found the defendant in contempt and did not try to coerce him, but punished him by sentencing him to 60 days in jail and that he made no attempt to purge himself and continued in contempt and that the Court should vindicate its authority and commit him to jail (Rec. p. 4; Abs. p. 44)

Mr. Wellman presented a Petition to the Court to Purge the Defendant of Contempt and tendered the sum of One Thousand ($1,000.00) Dollars due at the time of the entry of the Rule to Show Cause against the defendant to be paid from the cash bond deposit of Five Thousand ($5,000.00) Dollars held by the Clerk of the Court. Mr. Gleason refused the tender of One Thousand ($1,000.00) Dollars. The same Petition also prays for a modification of the Order for Temporary Alimony, entered June 25, 1957, providing for the payment of Two Hundred ($200.00)

Dollars per week (Rec. p. 4; Abs. pp. 44-45). Testimony was introduced and the Court interrupted the proceedings and stated:

> "I don't think you can say that he should be required to pay $200.00 a week to her and then at the same time to pay the entire bill for the support of the two children." (Rec. p. 4; Abs. p. 46)

The Court then suggested that counsel discuss the matter and a recess was taken. After some discussion between the Court and counsel, it was stipulated that there was $14,400.00 due under the Order for Temporary Alimony and Support, which was entered June 25, 1957, which included the $1,000.00 due at the time of the entry of the first rule, August 2, 1957, and that defendant would be entitled to credits of $6475. for moneys advanced in the schooling and support of the minor children and by reason of the marriage of the oldest child on January 1, 1958, leaving a balance due of $7925.00 as of the date of the hearing. By agreement of counsel an Order was entered authorizing the Clerk of the Court to pay plaintiff the sum of $5,000.00 from the cash bond deposit of the defendant, leaving a balance due of $2925.00 and that the second rule would be continued 120 days (Rec. p. 4; Abs. pp. 46-47)

Thereafter, evidence was heard by the Court on the Petition of the defendant to reduce the Order for Temporary Alimony and the Court thereupon reduced the amount of alimony to $90.00 per week with provision that the defendant pay for the schooling of the one minor child of the parties.

Thereupon the following took place:

> "I will set the amount at $90 a week. She has income of her own and she is going to get $5,000 today." (Rec. p. 4; Abs. 51)

At the hearing held before the Honorable Albert S. O'Sullivan on February 8, 1961, Mr. Wellman informed the Court that the matter came on for hearing on the defendant's Petition to be Purged of Contempt. He further informed the Court that on June 25, 1957 the Order for Temporary Alimony had been entered providing for the payment of $200.00 per week and that a Rule to Show Cause was entered on August 2, 1957 (Rec. 100) but that no finding was made as to how much the defendant was in arrears, but that it was set forth in defendant's Petition to be Purged that there was $1,000.00 due at the time. He then read the Order entered on September 6, 1957 sentencing the defendant to 60 days in jail and stated that an Appeal was taken and the Order was affirmed by the Appellate Court and he handed the Court a copy of the full opinion of the Appellate Court. In answer to a question of the Court, Mr. Wellman stated that there had been no hearing on the arrearage due at the time of the entry of the Decree for Divorce on February 28, 1959 (Rec. p. 4; Abs. p. 25).

Mr. Gleason stated that it was plaintiff's contention that the Court did not attempt to coerce the defendant into paying alimony, but it was the purpose of the Order to punish him. The Court stated that the usual procedure on a Contempt Order for failure to pay was to find the amount due (Rec. p. 4; Abs. p. 25).

Mr. Wellman then stated that the question arose as to whether or not the Order entered was for a direct criminal contempt or civil contempt and offered to cite law on the subject. Mr. Wellman then proceeded to read the Petition of the defendant to be Purged of Contempt (Rec. p. 4; Abs. pp. 25-29) and to Vacate the Order of Commitment, entered by Judge Decker on December 17, 1958. Mr. Wellman then stated that an Order had been entered on December 17, 1958 requiring the Clerk of the Court to

pay the plaintiff the sum of $5,000.00 from the cash bond of the defendant and that he had requested the Clerk to bring in the cancelled check. Mr. Gleason agreed, in open Court, that the $5,000.00 had been paid (Rec. p. 4; Abs. p. 29).

The Court then stated:

> "If you are going to limit, then show me how you were purged of contempt, and I will limit my hearing to the entry of the Order of Judge Carroll for Contempt of Court. I won't go beyond that." (Rec. p. 4; Abs. p. 29)

Mr. Gleason contended that the Order entered by Judge Carroll on September 6, 1957 was a "punitive Order and it was only a question of law and no question of fact was involved". (Rec. p. 4; Abs. p. 29)

Mr. Wellman then read the Order of Commitment, entered by Judge Decker on December 17, 1958. This Order set forth that on September 6, 1957, after a hearing on a Rule to Show Cause for Failure to pay Alimony under the Temporary Order, entered June 25, 1957, that the defendant was sentenced to jail for 60 days "for his contempt of Court arising out of his failure to comply with said Support Order". It further stated "that, on April 3, 1958, the Order finding the defendant in contempt for failure to comply with said support was affirmed". It further provided for the issuance of a mittimus. (Rec. p. 4; Abs. pp. 30-31)

At the conclusion of the hearing the Court entered an Order denying defendant's Petition to Vacate and be Purged of Contempt.

A timely appeal was taken to the Appellate Court of Illinois for the Second District from the Order providing for the issuance of a mittimus entered by Judge Decker on December 17, 1958 and from the Order of Judge O'Sullivan entered on February 8, 1961, denying Petitioner's

Petition to be purged of contempt of court and to vacate the Order of Commitment entered December 17, 1958, and the Notice of Appeal (Rec. p. 4; Abs. pp. 23-24) reads as follows:

> "1. Joseph A. Kovac, Appellant above named, hereby appeals from the Order entered in this cause on December 17, 1958, whereby it was Ordered that a Mittimus issue from the office of the Clerk of the Circuit Court of McHenry County, Illinois, directed to the Sheriff of McHenry County, Illinois, to take the body of the defendant, Joseph A. Kovac, and him closely and safely keep in the custody of said Sheriff in the common jail of McHenry County until he shall have served 60 days, or until released by due process of law.
>
> 2. Joseph A. Kovac, Appellant above named, further hereby appeals from the Order, entered in this cause on February 8, 1961, denying the Petition of Appellant, filed December 22, 1958, praying that he be purged of contempt, that the Order entered December 17, 1958, committing him to the common jail of McHenry County, Illinois, for a period of 60 days and ordering the issuance of a Mittimus for said commitment and that the Order entered in said cause on September 6, 1957, be vacated and set aside and that he be discharged from said contempt Order.
>
> 3. Appellant, Joseph A. Kovac, prays that all of said Orders be reversed."

No attempt at a second appeal from the Order holding Defendant in contempt entered September 6, 1957, was made.

Respondent herein filed a Motion in the Appellate Court to dismiss Petitioner's appeal on the ground that the prior opinion of the Appellate Court was "*res judicata*" without having raised said question in the lower court. Respondent also filed suggestions in support of said Motion, and Petitioner filed objections to the Motion and filed points and authorities and suggestions in support of said objections.

An Order was entered by the Appellate Court taking said Motion with the case (Rec. p. 4; Abs. pp. 57-58).

On November 15, 1961, an Order was entered by the Appellate Court sustaining the Motion of the Respondent to dismiss said appeal (Rec. p. 4; Abs. pp. 58-59), and an opinion was rendered holding that the prior decision of the Appellate Court rendered on April 3, 1958, was "*res judicata*" (Appendix 13) This question was not raised by Respondent in the trial court, as she filed no pleading to the Petition of the Petitioner to be purged of contempt and arose for the first time in the Appellate Court of Illinois.

A timely Petition for rehearing was filed in said Appellate Court, and on December 1, 1961, an Order was entered denying Petitioner's Petition for rehearing (Rec. p. 4; Abs. p. 59)

A timely Petition for Leave to Appeal to the Supreme Court of Illinois was filed and was denied by Order entered by the Supreme Court of Illinois on March 20, 1962, thereby making the decision of the Appellate Court, rendered November 15, 1961, as a final judgment of the highest court of the State of Illinois.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

1. The decision of the Supreme Court in upholding the decisions of the Appellate Court of Illinois that the Order finding Petitioner in contempt of court entered September 6, 1957, was a "punitive" Order, which would constitute direct criminal contempt of court, denied Petitioner due process of law, and disregards the decisions of this Court and the Supreme Court of Illinois pertaining to contempt of court.

In its opinion rendered November 15, 1961, the Appellate Court, through Justice Dove, set forth that a Rule To Show Cause was entered against Petitioner, as to why he should not be held in contempt of court for failure to comply with a temporary support Order; that an Answer was filed by Petitioner to the Petition for a Rule To Show Cause. (Appendix 3)

The order entered September 6, 1957, merely found the Petitioner in contempt of court and sentenced him to 60 days in jail and said nothing else.

In the Order of Commitment entered by Judge Decker on December 17, 1958, there were findings as follows:

> "That on June 25th, 1957 an order was entered herein requiring the Defendant, Joseph A. Kovac to pay to the Plaintiff as temporary support for the Plaintiff and the minor children of the parties, the sum of $200.00 per week until the further order of Court, and that said order of support has never been reversed, modified or vacated and is now in full force and effect.
>
> That on September 6, 1957, after hearing on a rule to show cause served upon the defendant, this Court ordered the Defendant to be committed to the County Jail of McHenry County, Illinois, for a period of 60 days for his contempt of Court *arising out of his failure to comply with said support order.*" (Italics ours)

Petitioner, when he was served with the Rule To Show Cause, prepared to answer a civil contempt proceeding instituted to enforce the private rights of his wife, and intended to compel the doing of an act necessary to the administration of justice in enforcing such private right and was not called upon to answer a citation for direct, criminal contempt.

The action of the Illinois Courts holding said contempt direct criminal contempt, not civil contempt, constitutes a flagrant violation of Petitioner's rights to due process of law. This Court, the Supreme Court and the Appellate Courts of Illinois have distinguished between civil contempt and criminal contempt.

In the case of *People* v. *Loughran*, 2 Ill. 2d 258; 118 N.E. 2d 310, the Supreme Court of Illinois said:

> "In a direct criminal contempt proceeding, that is, for contempts committed in the presence of the judge, in court, which he observes and has personal knowledge of, no formal charge is filed and no plea, issue or trial is required. *In re Terry*, 128 U.S. 289, 9 S. Ct. 77, 32 L. Ed. 405.. The contempt having been committed in the presence of the court, evidence is unnecessary and no record is made. *People ex rel. Owens* v. *Hogan*, 256 Ill. 496, 109 N.E. 177. However, the accused has a right of appeal and it is therefore necessary for the court to enter a written order setting forth fully and clearly the facts out of which the contempt arose so that the reviewing court may determine if the committing court had jurisdiction to enter the order. *People* v. *Rongetti*, 344 Ill. 107, 176 N.E. 292. All the essential facts must be fully set forth and no part thereof can be supplied by presumption or inferences. *People* v. *Tavernier*, 384 Ill. 388, 51 N.E. 2d 528, and no facts which did not occur in the presence of the court should be taken into consideration by the Court in adjudging guilty or in fixing the punishment. *People* v. *Rongetti*, 344 Ill. 107, 176 N.E. 292."

To the same effect is the case of *People* v. *Koniecki*, 28 Ill. App. 2d 483, 171 N.E. 2d 666 at 668 and *People* v. *Howarth*, 415 Ill. 499, 114 N.E. 2d 785.

In the case of *People* v. *Gholson*, 412 Ill. 294, 106 N.E. 2d 333 at 336 the Supreme Court of Illinois said:

> "Penalties for criminal contempt are purely *punitive*, while penalties for civil contempt are remedial, coercive and punitive." *People* v. *Redlich*, 402 Ill. 270, 83 N.E. 2d 736." (Italics ours)

Neither the Order holding Petitioner guilty of contempt entered September 6, 1957, nor the Order of Committment entered December 17, 1958, meets the requirements of law pertaining to direct criminal contempt, notwithstanding the holding of the Appellate Court that said Order of September 6, 1957, was "punitive", which holding is in direct contradiction to the above named decisions.

In the case of *Wilson* v. *Prochnow*, 359 Ill. 148, 194 N.E. 246 at 247 the Supreme Court of Illinois said:

> "Contempts have been classified as criminal contempts and civil contempts. The former induces acts in disrespect of the court or its process, and those tending to bring the court into disrepute or obstruct the administration of justice. Civil contempts have been characterized as quasi-contempts, and consist in failing to do something which the contemner is ordered by the court to do for the benefit or advantage of another party to the proceeding before the court. In such a case the process is civil. *Hake* v. *People*, 230 Ill. 174, 82 N.E. 561; *Holbrook* v. *Ford*, 153 Ill. 633, 39 N.E. 1091, 27 L.R.A. 324, 46 Am. St. Rep. 917. In this class of cases, while the authority of the court may be said to be incidentally vindicated, its power is called in to exercise for the benefit of a private litigant and not in the public interest merely. If imprisonment is ordered, it is not as a punishment but to the end that

the other party to the suit may obtain a remedy for the advancement of his own private interests and the rights which he could not otherwise procure. *People* v. *Elbert*, 287 Ill. 458, 122 N.E. 816; *O'Brien* v. *People*, 216 Ill. 354, 75 N.E. 108, 108 Am. St. Rep. 219, 3 Ann. Cas. 966; *Loven* v. *People*, 158 Ill. 159, 42 N.E. 82; *People* v. *Dietrich*, 141 Ill. 665, 30 N.E. 1038; *Crook* v. *People*, 16 Ill. 534."

In the case of *Cory Corporation* v. *Fitzgerald*, 335 Ill. App. 579, 82 N.E. 2d, 485 at 490 the Court said:

"Proceedings for contempt are of two classes: (1) those prosecuted to punish for disobedience of the court's orders and having as the principal object the preservation of the power and the vindication of the dignity of the court; and (2) those prosecuted to preserve and enforce the rights of private parties suits, and to compel obedience to orders and decrees made to enforce the rights, and to administer the remedies to which the court has found them to be entitled. *Besette* v. *W. B. Conkey Co.*, 194 U.S. 324, 24 S. Ct. 665, 48 L. Ed. 997."

The Supreme Court of Illinois in the case of *Barclay* v. *Barclay*, (1900) 184 Ill. 471, 56 N.E. 821, which was a contempt proceeding for the non payment of alimony, said:

"This is a civil action for the benefit of the wife, complainant in the separate maintenance proceeding, to enforce the payment of the amount decreed her in that action. (Citing *People* v. *Diedrich*, 141 Ill. 665, 30 N.E. 1038, and cases cited; *Leopold* v. *People*, 140 Ill. 552, 30 N.E. 348; *Lester* v. *People*, 150 Ill. 408; 23 N.E. 387, 37 N.E. 1004.) Being a proceeding for the enforcement of a civil remedy, the defendant's personal presence was not necessary to authorize the court to enter the order of committal. *Petrie* v. *People*, 40 Ill. 334; *O'Callaghan* v. *O'Callaghan*, 69 Ill. 552. The reason for the distinction in this regard between criminal and civil contempt proceedings is well defined in *Pitt* v. *Davison*, 37 N.Y. 235."

In the case of *LaRue* v. *LaRue*, 341 Ill. App. 411, 92 N.E. 2d 823 at 825, Justice Dove, who wrote both opinions in the case of *Kovac* v. *Kovac* held:

> "Proceedings to commit parties to jail for refusal to comply with a court order to pay money to other parties are civil contempts. *Wilson* v. *Prochnow*, 359 Ill. 148, 194 N.E. 246; *People ex rel. Meier* v. *Lewe*, 380 Ill. 531, 44 N.E. 2d 551. A detailed discussion of the distinction between civil and criminal contempt orders and how they are affected by bankruptcy adjudication is presented in *Parker* v. *U.S.*, 1 Cir. 153 F. 2d 66, 72, 163 A.L.R. 379. In that case it was held that where a party failed to comply with an equity decree and a contempt order was issued involving a fine and imprisonment for failure to pay the fine to the aggrieved party in the original equity proceeding, such contempt order was not binding after defendant's adjudication in bankruptcy. The court stated that the compensatory fine was not to be regarded as a penalty levied by the court for a contumacious act, and that the purpose of the contempt petition was to obtain the benefit of the original decree in equity. In conclusion, the court said: 'Now that the creditor in whose sole interest the fine was imposed, has become disentitled to claim it further, the court cannot change the characteristic of the fine from a remedial one to a punitive one • • • because the contempt proceeding from its inception was one of civil contempt.'"
>
> "In the instant case no fine was imposed but appellant was imprisoned for 90 days or until he should purge himself of the contempt by paying appellee $1300. As in the *Parker* case, *supra*, the imprisonment was ordered, not as a punishment but to the end that the private interest of appellee may be advanced. Under the authority of the *Parker* case, the contempt order in the instant proceeding was improper after appellant's adjudication in bankruptcy."

Justice Dove, not only ignored the decision of other cases cited, but his own decision in the *LaRue* case.

In the case of *Eastman* v. *Dole*, 213 Ill. App. 364 at 367 there is discussed the distinction between criminal and civil contempt of court:

> "But where a party to a civil suit, having the right to demand that the other party do some act for his benefit and to his advantage in the litigation, obtains an order of the court commanding it to be done, and the party so ordered refuses to do as directed, the court may proceed as for a contempt, and this is what is known as a civil contempt. Whatever the court does in the latter class of cases, whether by way of ordering a fine or imprisonment, it acts for the purpose of advancing the civil remedy of the other party to the suit."

This case cites as authorities for such holding, the following: *Lester* v. *People*, 150 Ill. 408, 424, 425; *Crook* v. *People*, 16 Ill. 534, 538; *Buck* v. *Buck*, 60 Ill. 105, 106; *Leopole* v. *People*, 140 Ill. 552, 556, 559; *People* v. *Diedrich*, 141 Ill. 665, 669, 670; *Holbrook* v. *Ford*, 153 Ill. 633, 647; *Swedish American Tel. Co.* v. *Fidelity & Casualty Co. of New York*, 208 Ill. 562, 572; *O'Brien* v. *People*, 216 Ill. 354, 368, 369; *Hake* v. *People*, 230 Ill. 174, 185; *Baenes & Co.* v. *Chicago Typographical Union No. 16*, 232 Ill. 402, 490; *Rothschild & Co.* v. *Steger & Sons Pianno Mfg. Co.*, 256 Ill. 96, 201.

It has been held that where a party prepares to answer an allegation pertaining to a civil contempt, that he cannot be held guilty of criminal contempt, and that as to such holding of the court, the judgment violates both the Constitution of the State of Illinois and the Federal Consfitution by depriving such person of his liberty without due process of law.

Thus it can clearly be seen that not only the Order for contempt entered herein, but the Order of Commitment entered on December 17, 1958, pertained to civil contempt

only and both are void for failing to contain provisions whereby Petitioner-Defendant could purge himself of contempt, which he did by paying the sum of $1,000.00, being the amount of support due at the time of the entry of the Rule To Show Cause.

By no stretch of the imagination, can said contempt be criminal contempt, and neither Order meets the test as laid down by this Court, the Supreme Court of Illinois and the Appellate Court of Illinois for a valid Order holding a person in direct criminal contempt of court.

2. The contempt of Petitioner cannot be construed as direct criminal contempt in that such proceedings must be instituted in the name of the People of the State of Illinois and prosecuted by the State's Attorney in the County in which such contempt arises.

All of the proceedings in this matter at bar have been instituted in the name of "*Lucile R. Kovac* v. *Joseph A. Kovac*". This not only pertains to the contempt Order entered September 6, 1957, but to the Order of Committment entered December 17, 1958. It has been held in the case of *People* v. *Peters*, 305 Ill. 223, 137 N.E. 118 at 120; *Tunnell* v. *People*, 253 Ill. App. 422, and *People* v. *O'Meara*, 216 Ill. App. 173 that a criminal contempt must be prosecuted in the name of the People of the State of Illinois, and that such is the course of procedure under Article VI, Section 33 of the Constitution of the State of Illinois.

The same is true in Federal Courts, *Ex Parte Grossman*, 1925, 267 U.S. 87, 111, 45 S. Ct. 332, 334, 69 L. Ed. 527, 38 A.L.R. 131.

3. When a party to a divorce proceeding is held in contempt of court for failure to pay alimony and subsequently pays such alimony due, he is denied equal protection of the

laws when he is sentenced for contempt of court when it has been held that payment of such alimony purges one of contempt.

It has been held that a person has the right to purge himself of contempt, and that where a person satisfies the Order on which a contempt is based, that he is entitled to his discharge from the contempt.

People v. *Redlich*, 402 Ill. 270, 83 N.E. 2d 736.

Parker v. *U.S.*, 1 Cir. 153 F. 2d 66, 72, 163 A. L. R. 379.

Eastman v. *Dole*, 213 Ill. App. 364.

By the payment of alimony due, the contempt Order fell, and to enter an Order of Commitment as the trial judge did after the sum of $1000 due under the Rule To Show Cause had been paid in open Court, deprived Petitioner of due process of law.

4. For the Illinois Supreme Court to uphold the Appellate Court affirming the Order holding Petitioner in contempt was *res judicata* as to his Petition to be purged of contempt, deprived Petitioner of due process of law, in that said question was not raised by Respondent in the trial court.

The only questions raised by the appeal to the Appellate Court of Illinois were as to the right of the Trial Court to enter the Order of Commitment entered December 17, 1958, well knowing that the alimony due had been paid and whether or not the payment of such alimony due under the Rule To Show Cause purged Petitioner of contempt for failure to pay such alimony.

Petitioner did not and could not question the validity of the Order holding him in contempt since it was affirmed by the Appellate Court. However, he had every right to raise the question as to whether or not he had purged himself of contempt for which he had been found guilty.

The Appellate Court in its opinion rendered April 3, 1958, did not pass upon the question as to whether the contempt was criminal contempt or civil contempt. It did say in its opinion of November 15, 1961, that the contempt was "punitive" which constituted direct criminal contempt, as herein set forth. This finding by the Appellate Court constitutes a finding denying the Petitioner due process of law.

The Court then went further say that a Petition to be purged of contempt could not be presented because the matter was "*res judicata*" under its first decision.

Section 48 of the Practice Act of the State of Illinois provides that to properly raise a question of *res judicata*, such question must be raised in the Trial Court by proper plea, which shall be by a Motion to dismiss for the following, amongst other reasons:

> "That the cause of action is barred by a prior judgment."

Petitioner filed his Petition on December 22, 1958, to vacate the Order providing for the issuance of a mittimus entered by Judge Decker on December 17, 1958, and to purge him of contempt by reason of his payment of alimony and support under the Rule To Show Cause. Respondent filed no answer to this Petition nor any pleading thereto, and therefore raised no question of *res judicata*. To properly raise this question she should have filed a Motion to strike and dismiss this Petition in accordance with Section 48 of the Practice Act of the State of Illinois, in the Trial Court.

Respondent filed a Motion in the Appellate Court of Illinois to dismiss Petitioner's appeal on the ground that its first decision was "*res judicata*" and such Motion was allowed by the Appellate Court. This question cannot be

raised for the first time in the Appellate Court under the provision of the Civil Practice Act of Illinois, and decisions of the Illinois Courts of last resort.

In the case of *Sunga* v. *Lee*, 13 Ill. App. 76, 141 N.E. 2d 6" the Court said:

> "On this appeal defendants assign six grounds for reversal only one of which was specified in the trial court. This court on numerous occasions has held that an issue not raised in the trial court cannot for the first time be raised on appeal unless such issue goes to the jurisdiction."

In the case of *Petterson* v. *Bournemann*, 318 Ill. App. 226, 47 N.E. 2d 521, which is a memorandum decision, under Point 1 in the syllabus in the North Eastern Reports states:

> "If a previous adjudication is relied on as a bar to an action, it must be set up by plea or answer."

To the same effect is *Investors Commercial Corporation* v. *Metcalf*, 13 Ill. App. 2d 99; 140 N.E. 2d 924.

The action of the Appellate Court of Illinois and the subsequent action of the Supreme Court of Illinois in denying the Petition for Leave to Appeal from said decision of the Appellate Court denied Petitioner due process of law and equal protection of the laws, as guaranteed by both the Illinois Constitution and the Constitution of the United States.

The finding of the Appellate Court in its second opinion, rendered November 15, 1961, that the contempt of which the Trial Court found Petitioner guilty was "punitive", which constitutes direct criminal contempt, deprived Petitioner of due process of law, in that he was charged with civil contempt by the Rule To Show Cause.

The Petition for a Rule To Show Cause set forth that Petitioner had failed to comply with the Order for temporary support entered June 25, 1957, and prayed that a Rule To Show Cause be entered as to why Petitioner should not be held in contempt of court for failure to comply with said temporary support Order (Rec. p. 4; Abs. p. 2).

A Rule To Show Cause was entered against Petitioner and served upon him. He filed a written Answer to the Rule To Show Cause (Rec. p. 4; Abs. pp. 3-4) and a hearing was had on September 6, 1957, at which time the Order entered merely found him in contempt of court and sentenced him to 60 days in jail and nothing else (Rec. p. 4; Abs. p. 5).

This was not and could not be anything other than civil contempt to assist his wife in collecting her support and for the Appellate Court to hold that this was "punitive contempt", which is a new innovation in the law of contempt, if it does not constitute direct criminal contempt, is the equivalent of finding a man guilty of murder when he was charged with only manslaughter. This never has been the law, and should not be countenanced as the law by this Court.

5. A person charged with civil contempt cannot be convicted of criminal contempt.

Both the Constitution of the State of Illinois and the United States guarantees the right of a person to be informed of what his is charged with and if he is charged with one offense, he cannot constitutionally be convicted of another offense. The Fourteenth Amendment to the Federal Constitution provides that no State shall deprive any person of life, liberty or property without due process of law or deny to any person, within its jurisdiction, equal protection of the laws. To permit the decision of the Appellate Court to stand holding that Petitioner was guilty

of "punitive contempt" would be a travesty of justice and a direct violation of the above Constitutional provisions.

In the case of *Parker* v. *U.S.*, 153 Fed. 2d 56 at 70, the Court said:

> "The respondent is entitled to due notice of the nature of the proceeding against him—whether of criminal or civil contempt. *In re Guzzardi*, 2 Cir., 1935, 74 F. 2d 671; *McCann* v. *New York Stock Exchange*, 2 Cir., 1935, 80 F. 2d 211, 214; *Federal Trade Commission* v. *A. McLean & Son*, 7 Cir., 1938, 94 F. 2d 802. If respondent is answering a charge of criminal contempt, he 'is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt, and cannot be compelled to testify against himself.' *Gompers* v. *Bucks Stove & Range Co., supra*, 221 U.S. at page 444, 31 S. Ct. at page 499, 55 L. Ed. 797, 34 L.R.A., N.S. 874. If he is called to answer in a civil contempt proceeding, a punitive fine cannot be imposed upon him. Where a fine is imposed in such a proceeding, it must not exceed the actual loss to the complainant caused by respondent's violation of the decree in the main cause plus complainant's reasonable expenses in the proceedings necessitated in presenting the contempt for the judgment of the Court. *Christensen Engineering Co.* v. *Westinghouse Air Brake Co.*, 2 Cir., 1905, 135 F. 774, 782; *Eustace* v. *Lynch*, 9 Cir., 1935, 80 F. 2d 652, 656.

This Court said in the case of *In the Matter of the Petition For a Writ of Habeas Corpus for Merritt W. Green, II*, No. 312 October Term, 1961, decided May 21, 1962:

> "We said in *In re Oliver*, 333 U.S. 257, 275 that procedural due process requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation."

This Court also said in *Norton Anthony Russell* v. *U. S.* and 5 other cases, being numbers 8, 9, 10, 11, 12 and 128, October Term 1961, decided on May 21, 1962:

> "The vice of these indictments, rather is that they failed to satisfy the first essential criterion by which the sufficiency of an indictment is to be tested, *i. e.*, that they failed to sufficiently apprise the defendant of what he must be prepared to meet."

The vice of this case does not lie in indictments, but rather in the fact that the Appellate Court of Illinois has held petitioner was guilty of direct criminal contempt of court for failure to pay alimony which he had already paid and thereby purged himself of said contempt. He was not advised that he was to be charged with criminal contempt; he was not charged with criminal contempt by the Rule To Show Cause filed against him, and could not constitutionally be held guilty of criminal contempt on the state of the record. It is grossly an invasion of his constitutional rights to due process of law.

CONCLUSION.

For the reasons hereinabove set forth, Petitioner prays that this Honorable Court issue its Writ of Certiorari to the Supreme Court of Illinois, to review the judgment of that Court entered March 21, 1962, and that upon said review, said judgment be reversed with directions to allow the Petition of Petitioner to be purged of the contempt of which he was found guilty by the Circuit Court of McHenry County, Illinois.

Respectfully submitted,

WALTER C. WELLMAN,
Attorney for Joseph A. Kovac,
Petitioner.

Constitutional Provisions, Opinion No. 1 and Opinion No 2 follow.

CONSTITUTIONAL PROVISIONS.

The 5th Amendment to the Constitution of the United States provides as follows:

AMENDMENT (V)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The 14th Amendment to the Constitution of the United States provides as follows:

AMENDMENT (XIV)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX I

OPINION OF THE APPELLATE COURT.

(Rendered April 3, 1958)

DOVE, P.J.

Lucile R. Kovac, on February 15, 1957, filed in the Circuit Court of McHenry County her verified two count complaint against her husband, Joseph A. Kovac. In the first count she sought a decree for divorce, the custody of her two minor children, for a portion of her husband's property and for attorney fees and expenses. The second count realleged substantially all of the allegations of the first count and averred that the parties had been living separate and apart since January 28, 1956 and prayed for separate maintenance for herself and children, for the custody of the children and for attorney fees.

In her complaint, she alleged, among other things, that the parties were married on August 2, 1933; that plaintiff had always conducted herself as a true, faithful and affectionate wife; that the defendant committed various acts of cruelty toward her and the children on May 1, May 4, and May 19, 1956 and deserted them on January 28, 1956. The complaint further alleged that the parties cohabited and lived together as husband and wife, in their home at Crystal Lake, Illinois until September 1, 1954 on which date defendant deserted the plaintiff and took up his residence in Chicago, Illinois; that defendant abandoned plaintiff in their marital home at Crystal Lake where plaintiff resides and that since September 1, 1954 defendant has only visited plaintiff at rare intervals.

The defendant was personally served with summons and filed his verified answer in which he admitted the marriage

and birth of the children, denied the charges of cruelty and desertion and averred that the parties separated by mutual agreement in 1955. To this answer the plaintiff filed a reply. Thereafter, and on June 7, 1957, the defendant filed a petition praying for an order determining the custody, education and control of the two daughters of the marriage, Elyse, age 16, and Judith, age 13 and on June 21, the plaintiff filed her verified petition praying for temporary alimony, support money, attorney fees and for other relief.

In this petition plaintiff alleged among other things, that she had been living separate and apart from the defendant without fault on her part since September 1, 1954; that the two minor children of the parties, were in the custody of the plaintiff in the residence of the parties located at Crystal Lake, in McHenry County, Illinois; that defendant was a certified public accountant, maintaining an office in Chicago, Illinois, and was interested in a variety of other business enterprises and that she was informed and believes that defendant's income from his profession, business interests and investments approximate the sum of $50,000.00 per year and that he was the owner of a substantial amount of real and personal property. She also alleged that she was possessed of no property, either real or personal, except an interest as legatee and devisee in the estate of her father, and that his estate was in the process of administration and that the only income which she received from it was rental from a five-room house, which was sufficient only to provide maintenance and upkeep of said house; that defendant had refused to contribute to the support of the plaintiff and her two minor children and that such refusal was wilful. This petition further alleged that plaintiff in 1956 filed her complaint for divorce in the Superior Court of Cook County, at Chicago; that defendant filed his appearance in that cause and objected to the jurisdiction

of the Superior Court of Cook County on the ground that his residence was in McHenry County and said proceeding was thereafter dismissed.

On June 25, 1957 a hearing was had upon both petitions resulting in an order denying any relief to the defendant upon his petition with reference to the custody of the children. This order then directed defendant to pay to the plaintiff, as temporary support of plaintiff and the two children of the parties, the sum of $200.00 per week until the further order of the court.

The defendant did not make any of the weekly payments required of him by this order, and on August 2, 1957, plaintiff filed her verified petition praying that the defendant be ruled to show cause why he should not be held in contempt of court for failure to comply with the provisions of the order entered on June 25, 1957. On the same day August 2, 1957, the defendant filed his verified petition by which he sought a modification of the order of June 25, 1957 and on August 22, 1957 filed his verified answer to plaintiff's petition for a rule to show cause. By his answer he admitted that he and his wife were living separate and apart, alleged that he had previously filed his petition to modify the order of June 25, 1957, denied that he had refused to pay the $200.00 per week to plaintiff and averred that plaintiff had indirectly received from him the sum of $5000.00 as and for household expenses, clothing for the two minor children of the parties, school tuition, board and lodging and other incidental expenses pertaining to the support and maintenance of plaintiff and the two children.

The issues thus made by the petition of plaintiff for a rule to show cause and the answer thereto and the petition of defendant to modify the order of June 25,

1957 were heard on September 6, 1957, at which time the parties were again present in court and represented by counsel. Evidence was heard and an order entered denying the prayer of defendant's petition to modify the support order and found the defendant to guilty of wilful contempt of court and sentenced him to the county jail of McHenry County for sixty days as punishment for said contempt. To reverse the portion of this order which found defendant guilty of contempt and sentencing him to jail for sixty days defendant appeals.

Appellant contends that the order of June 25, 1957 is void because the court was without jurisdiction of the subject matter of this proceeding at the time this order was entered.

In support of this contention counsel argue that there is no allegation in the complaint that the plaintiff had been a resident of the State of Illinois for more than one year prior to the filing of her suit, and that such an allegation is absolutely necessary in order for the court to have jurisdiction of the subject matter of plaintiff's suit for divorce or separate maintenance. The first paragraph of both counts of the complaint is as follows: "That the defendant abandoned the plaintiff in their marital home at Crystal Lake in McHenry County, where plaintiff resides" and in the fourth paragraph, it is alleged: "That the parties cohabited and lived together as husband and wife in their marital home at Crystal Lake, Illinois, until to-wit: September 1, 1954, on which date defendant deserted plaintiff and took up residence in Chicago, Illinois; that since the aforesaid date defendant has visited the plaintiff at rare intervals from time to time but that the parties have been living separate and apart for all practical purposes since the aforesaid date and have not cohabited as husband and wife." The defendant concedes

that the Circuit Court of McHenry County has jurisdiction generally in matters of divorce and separate maintenance, but defendant insists that, in the absence of an allegation that plaintiff had been a resident of the State of Illinois for at least one year prior to the filing of her complaint for divorce or separate maintenance the Circuit Court of McHenry County did not have jurisdiction of the subject matter of this proceeding. There is no merit in this contention.

In Grossman v. Grossman, 315 Ill. App. 345, the court (p. 355) cited and quoted from O'Brien v. People ex rel. Kellogg Switchboard & Supply Co., 216 Ill. 354, where the Supreme Court, omitting the cited authorities, said: (pp. 363, 364) "Jurisdiction is the power to hear and determine the subject matter in controversy between the parties to a suit. If the law confers the power to render a judgment or decree, then the court has jurisdiction. Jurisdiction of the particular matter does not mean simple jurisdiction of the particular case then occupying the attention of the court, but jurisdiction of the class of cases to which the particular case belongs. Whether a complaint does or does not state a cause of action is, so far as concerns the question of jurisdiction, of no importance, for if it states a case belonging to a general class over which the authority of the court extends, then jurisdiction attaches and the court has power to decide, whether the pleading is good or bad. Jurisdiction does not depend upon the rightfulness of the decision. It is not lost because of an erroneous decision, however erroneous that decision may be."

In the Grossman case, the court then cited Foreman Brothers Banking Co. v. Kelly Atkinson Construction Co., 218 Ill. App. 356, and quoted therefrom where it is said: (p. 358) "In urging that the judgment be reversed, the

defendant first contends that the judgment was void because the declaration showed no cause of action and no jurisdiction of the court to enter it. In our opinion the judgment was not void. We need not pass upon the question of whether the declaration showed a cause of action for, assuming it did not, it would not follow the judgment is void. It would be erroneous at most. Likewise, the sufficiency of the declaration has nothing to do with the court's jurisdiction. A court may have full jurisdiction of an action—the parties and the subject matter—though the declaration may wholly fail to state a cause of action. It is not denied that the court had jurisdiction of the parties to this suit. The jurisdiction of a court over the subject of a given case is the power of the court to hear and determine cases of the general class to which the case in question belongs."

It is true that before the Circuit Court of McHenry County could grant a divorce to appellee, it would be necessary for her to prove that she had been a resident of the State of Illinois for the length of time required by the statute and, at the time of filing her suit either she or the defendant was a resident of McHenry County. If the court, upon the hearing found that the statutory requirements were not present, the court could not grant her a divorce or separate maintenance, but it does not follow that the court, in this proceeding, did not have jurisdiction of the subject matter.

The issue involved in this appeal is not one of residence. The record here requires this court to determine whether the trial court was justified in finding defendant guilty of contempt of court on account of his failure to comply with the order entered on June 25, 1957, which directed him to pay $200.00 a week to the plaintiff for the support of herself and the two minor children of the marriage.

The issues made by the allegations of the complaint, answer and reply are still pending in the circuit court. This is an appeal only from that part of the order of the trial court which found defendant guilty of contempt and sentencing defendant to the county jail for refusing to obey an order previously entered by that court. The question of whether there was sufficient evidence to warrant the entry of the support of June 25, 1957, is not before us. The only question relative to the support order of June 25 to be considered now is whether the court had jurisdiction to make that order and not whether it was made on sufficient proof. We hold that the trial court did have jurisdiction of the subject matter and no question is raised as to jurisdiction of the parties.

At the hearing on the rule to show cause on September 6, 1957, the defendant admitted that he had not made any payments directly to his wife, as required by the court in its order of June 25. At the conclusion of that hearing the court stated that he thought the order of June 25 should be enforced and that the defendant should decide whether he was going to comply. A recess in order that counsel might confer was had and after the recess, counsel for plaintiff stated that nothing had come out of their talk. The court then stated that he did not like to send people to jail, even for the violation of a court order and would not do so if he had any assurance from the defendant that he would purge himself within a reasonable time, and he asked the defendant's counsel if he had anything to offer to the court. Whereupon defendant's counsel answered, "No." The court then stated: "It is the judgment of the court that the defendant be sentenced to the county jail of McHenry County for sixty days as punishment for his wilful and contumacious contempt of this court." The formal written contempt order, followed this judgment and in our opinion it meets

the requirement that an order finding a person in contempt of court be certain and definite. There can be no mistake as to how long the defendant is to remain in jail, as the time is fixed at sixty days. (Kanter v. Clerk of the Circuit Court, 108 Ill. App. 287, 305)

Without conceding that the support order of June 25, 1957, was valid, counsel for appellant argue that the evidence was insufficient to justify the trial court in finding defendant guilty of contempt inasmuch as the evidence discloses that defendant permitted his children to purchase clothing and other necessaries which he paid for and that in addition he paid tuition to a boarding school which the girls planned to attend. There was introduced into evidence at the hearing by stipulation an exhibit which showed that defendant had paid $516.29 between July 17, 1957, and July 30, 1957, for utilities, yard work, automobile repairs, clothing for one of the daughters and other items of expense in connection with the Crystal Lake home and during the month of August, 1957, defendant had paid $1,170.86 for clothing for his two daughters and $1,600.00 for their school tuition and board. These amounts aggregate $3,287.15.

The order of June 25, 1957, directed defendant to pay to the plaintiff $200.00 a week for the support of his wife and their two children. The defendant admits that he has not made these weekly payments. The fact that he was generous in paying tuition and board for his children at Fairfax Hall and in purchasing clothing for them and did pay for some of the utilities and upkeep for the home occupied by his wife and children after the support order was entered, does not excuse his wilful failure to comply with that support order. It is not insisted that appellant is unable to pay the amount directed and no excuse is suggested, other than the foregoing, why he does not do so.

In Anderson v. Anderson, 124 Ill. App. 613, it is said: (p. 621) "If the order of commitment was intended as punishment, it should have fixed a definite time of imprisonment, and if it was intended as a means to compel payment of the alimony awarded, it should have provided for appellant's release on payment of the alimony."

In Kahlbon v. The People, 101 Ill. App. 567, the court (p. 68) quoted from Rapalje on Contempts, Sec. 129, where it is said: "—the better opinion seems to be that the order of commitment should name a definite term of imprisonment in all cases when the imprisonment is inflicted as a punishment for the contempt, and not as a means to compel the party to do some act required of him by the court."

There is no reversible error in this record and the judgment appealed from is affirmed.

Judgment affirmed.

McNeal, J. concurs.
Spivey, J. concurs.

APPENDIX II

OPINION OF THE APPELLATE COURT.

DOVE, P. J.

On February 14, 1957 Lucile R. Kovac filed her complaint against her husband for divorce or alternatively for separate maintenance. She charged her husband with cruelty and desertion. During the pendency of the suit and on June 25, 1957 an order was entered directing the husband to pay his wife $200.00 per week for the temporary support of herself and two minor children. On August 2, 1957, Mrs. Kovac filed her petition alleging noncompliance with this order by her husband and praying that a rule be entered requiring him to show cause why he should not be held in contempt of court for failing to comply with the provisions of this order. An answer to this petition was filed by Mr. Kovac who also, filed a cross petition seeking a modification of the order of June 25, 1957.

A hearing was had resulting in an order, entered on September 6, 1957, adjudging defendant in contempt of court and sentencing him to the County Jail of McHenry County for sixty days. This order was reviewed by this court, upon the appeal of Mr. Kovac and on April 8, 1958 the contempt order entered by the Circuit Court of McHenry County on September 6, 1957 was affirmed. (*Kovac v. Kovac*, 17 Ill. App. 2d 492, 150 N.E. 2d 664). Leave to appeal to the Supreme Court was denied. (20 Ill. App. 2d VI).

Thereafter, on December 17, 1958 a verified petition by Mrs. Kovac was filed, setting forth that her spouse had paid nothing pursuant to the order of June 25, 1957 and

that there was due petitioner thereunder, the sum of $14,000.00. The petition prayed for an order directing the issuance of a mittimus to enforce the order of June 25, 1957 and that the same be delivered to the Sheriff of McHenry County to execute. Upon this petition an order was entered, which after reciting what had previously taken place concluded:

> "It is therefore ordered that a mittimus issue from the office of the Clerk of this Court directed to the Sheriff of McHenry County to take the body of the defendant, Joseph A. Kovac, on December 22, 1958 or as soon thereafter as he may secure the body of the said defendant, and him closely and safely keep in the custody of said sheriff in the common jail of McHenry County until he shall have served 60 days or until released by due process of law".

On the same day this order was entered Mr. Kovac filed his petition asking for a modification of the order of June 25, 1957; that the order sentencing him to jail for 60 days be vacated and that the cause be set for trial "so that the rights of the parties may be finally determined". The prayer of this petition was granted in part and the previous order was modified in some respects not material, however, to the determination of the question presented, by this record, for review by this court. Thereafter the case was heard resulting in a decree granting Mrs. Kovac a divorce. That decree was reviewed by this court and affirmed. (*Kovac* v. *Kovac*, 26 Ill. App. 2d 29, 167 N.E. 2d 281).

On December 22, 1958 Mr. Kovac filed his petition praying for an order vacating the orders entered on September 6, 1957 and on December 17, 1958 and that he be discharged from said contempt order. Upon a hearing the prayer of this petition was denied and Mr. Kovac again brings the record to this court for review.

Counsel for appellant state that the order of September 6, 1957 was erroneous because it makes no provision whereby the defendant might purge himself of the contempt. It is insisted by counsel that upon the former appeal this court did not hold that defendant was guilty of a direct contempt or an indirect contempt of court and did not decide whether the contempt was civil or criminal or whether defendant had a right to purge himself from the contempt of which he was found guilty. Counsel state that all this court held was that the order entered by the chancellor was sufficient to hold defendant in contempt of court and insists that "the issues are plainly different on this appeal from the former one."

Counsel for appellant further state that the contempt of which appellant was found guilty was a civil contempt, for the benefit of the plaintiff; that defendant did not embarrass, hinder or obstruct the court in the administration of justice or lessen its authority or dignity; that the proceeding was strictly civil, not criminal and defendant had the right to purge himself by paying the amount due at the time the rule to show cause was entered.

In our former opinion this court said: "At the hearing on the rule to show cause on September 6, 1957, the defendant admitted that he had not made any payments directly to his wife, as required by the court in its order of June 25. At the conclusion of that hearing the court stated that he thought the order of June 25 should be enforced and that the defendant should decide whether he was going to comply. A recess in order that counsel might confer was had and after the recess, counsel for the plaintiff stated that nothing had come out of their

talk. The court then stated that he did not like to send people to jail, even for the violation of a court order and would not do so if he had any assurance from the defendant that he would purge himself within a reasonable time, and he asked the defendant's counsel if he had anything to offer to the court. Whereupon defendant's counsel answered, 'No'. The court then stated: 'It is the judgment of the court that the defendant be sentenced to the county jail of McHenry County for sixty days as punishment for his wilful and contumacious contempt of this court'. The formal written contempt order, followed this judgment and in our opinion it meets the requirement that an order finding a person in contempt of court be certain and definite. There can be no mistake as to how long the defendant is to remain in jail, as the time is fixed at sixty days''. (*Kovac* v. *Kovac*, 17 Ill. App. 2d 492).

In view of our holding in *Kovac* v. *Kovac*, 17 Ill. App. 2d 492, 150 N.E. 2d 664 the contempt order of September 7, 1957 is *res adjudicata*. We held it definite and certain. It was a punitive order intended to punish defendant for his flagrant and wilful disobedience of a valid order entered by the court. It was not intended as a means to coerce payment of the amount due the plaintiff under a prior order entered by the court. Had it been it would have provided for the release of defendant upon compliance with that order.

Appellant complained on the first appeal and now insists that the order adjudging him in contempt did not give him the choice of paying to his wife what he had been ordered to pay her or going to jail for non-compliance. Under the facts disclosed by this record, appellant invited the order which the trial court indicated he preferred not to enter.

There is no merit in this appeal. Furthermore this is a second attempt upon the part of appellant, to procure a review of the same o der which we previously have considered and affirmed. The motion of appellee to dismiss the appeal, which we took with the case, will be sustained and this appeal will be dismissed. (*J. H. Walters & Co.* v. *Canham Sheet Metal Corp.*, 8 Ill. App. 2d 121, 127).

Appeal dismissed.

McNeal, J. concurs.
Smith, J. concurs.